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No. 82-4

# In the Supreme Court of the United States

OCTOBER TERM, 1982

B.F. DIAMOND CONSTRUCTION COMPANY, ET AL., PETITIONERS

*v.*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT

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## QUESTION PRESENTED

Whether a bridge construction worker who supervised the unloading of construction materials from a barge docked in navigable waters was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 676 F. 2d 547. The opinion of the Benefits Review Board (Pet. App. B-1 to B-11) is reported at 14 Ben. Rev. Bd Serv. (MB) 313. The decision and order of the administrative law judge (Pet. App. C-1 to C-4) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 17, 1982. The petition for a writ of certiorari was filed on July 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Respondent Elizabeth Browning is the widow of Joseph D. Browning, who was employed by petitioner B.F. Diamond Construction Company. Browning was killed on the job while helping to construct a highway bridge across navigable waters of the Gulf of Mexico and the Choctawhatchee Bay in Okaloosa County, Florida (Pet. App. A-3, B-2). The decedent was a rig foreman who, at the time of death, was in charge of the operation of a crane barge that was used to unload metal forms from a supply barge and set them around "cages" of steel reinforcement rods. Concrete would then be poured into the forms to construct bridge columns or piers (*id.* at A-3, B-2). The decedent's duties were performed on both the barge and the piers (*id.* at B-2) and took place in about 20 feet of water, 500-600 feet from shore (*id.* at A-3). At the time of his death, Browning was standing on top of a "footing," consisting of pre-cast piles driven into the riverbed, when a cage fell upon him. There were no eyewitnesses to the accident, but there was testimony that at the time of his death Browning may have been highlighting certain engineering marks with paint to facilitate the setting of metal forms around the cages (*id.* at A-3, B-2).

Mrs. Browning filed a claim for compensation for her husband's death under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* The administrative law judge denied the claim, holding that the decedent did not meet the "status" test of Section 2(3) of the Act, 33 U.S.C. 902(3). Specifically, the ALJ held that Browning "was neither a longshoreman or engaged in longshoring operations," nor was he a ship repairman, shipbreaker, or shipbuilder (Pet. App. C-3). "Therefore, to qualify for benefits under the Act, the Claimants would have to show that the employee was 'a harbor worker' or 'any person engaged in maritime employment,' " within the

meaning of Section 2(3) (Pet. App. C-3). The ALJ concluded that decedent was not a harborworker because a bridge "is different both in nature and purpose from the typical facilities servicing a harbor" (*ibid.*). The ALJ also concluded that bridge construction was not "maritime employment" under prior Benefits Review Board decisions that required a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters" (*id.* at C-4).

Mrs. Browning appealed to the Benefits Review Board pursuant to Section 21(b)(3) of the Act, 33 U.S.C. 921(b)(3). In a 2-1 decision, the Board ruled that the decedent was not covered by the Act, relying on its prior precedent that bridge builders are not "harborworkers" or otherwise engaged in "maritime employment" within the meaning of Section 2(3) (Pet. App. B-4). The Board also rejected the argument that the decedent was engaged in "longshoring operations" by virtue of his unloading metal forms from a supply barge. The Board relied on Second Circuit precedent that unloading supplies from barges during the course of marine construction work does not constitute "longshoring operations" (*id.* at B-4 to B-5). See *Fusco* v. *Perini North River Associates*, 622 F. 2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981).[1]

Mrs. Browning sought review of the Board's decision in the court of appeals pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c). The Director participated as respondent and filed a brief in support of the petition for review. The court granted the petition and, relying on the Fifth Circuit's

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[1] Board Member Miller dissented, relying on his view that employees, who would have been covered prior to the 1972 amendments, are "engaged in maritime employment" within the meaning of the amended Act (Pet. App. B-8). Moreover, he believed that the decedent was covered by virtue of his supervision of the unloading of materials used in the bridge construction project (*id.* at B-9).

decision in *Gilliam* v. *Wiley N. Jackson Co.*, 659 F. 2d 54 (1981), petition for cert. pending, No. 81-1039 (filed Dec. 4, 1981), held that Browning was covered by virtue of his unloading duties. In *Gilliam*, the Fifth Circuit found that a worker who was injured while unloading pilings from a supply barge was "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3). The court here stated (Pet. App. A-5) that "Browning, at the time of his injury, was involved with the unloading of the metal forms from a barge moored in navigable waters" and therefore met the status test of Section 2(3).[2]

**DISCUSSION**

The court of appeals correctly resolved the LHWCA coverage issue in this case. The court correctly concluded that a bridge construction worker who supervised the unloading of materials from a barge was engaged in "maritime employment" within the meaning of Section 2(3) of the LHWCA. This ruling, however, conflicts with a recent decision of the Second Circuit that denies benefits to a marine construction worker who was injured on actual navigable waters while supervising the unloading of materials from a barge. *Churchill* v. *Perini North River Associates*, 652 F. 2d 255 (1981), cert. granted *sub nom. Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, No. 81-897 (Feb. 22, 1982). Because of this conflict, we suggest that the Court hold this petition in abeyance, pending decision in the *Perini* case.

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[2]The court also concluded that Browning met the situs test of Section 3(a) of the Act, 33 U.S.C. 903(a). Although "the issue of whether Browning was injured while on 'navigable waters' was not explicitly decided by the ALJ or the Review Board, no real question is raised on this point" (Pet. App. A-6).

1. Browning's death is compensable under the Act for the reason expressed by the court of appeals: the decedent performed longshoring duties as a regular part of his bridge construction job. Section 2(3) describes a covered employee as "any person engaged in maritime employment, including any longshoreman *or other person engaged in longshoring operations* * * *" (33 U.S.C. 902(3); emphasis added). Contrary to petitioners' contention (Pet. 4-5, 10), it does not matter whether Browning was unloading metal forms from the barge at the moment of injury (Pet. App. A-5). This Court has specifically held that, under the 1972 amendments to the LHWCA, Congress "counted as 'longshoremen' persons who spend 'at least some of their time in indisputably longshoring operations.' " *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 75 (1979), quoting *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977). And, as the court of appeals noted, "employee status can be based upon the maritime nature of the employment as a whole or upon the nature of the claimant's activity at the time of the injury" (Pet. App. A-4). See *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F. 2d 750, 754 (5th Cir. 1981), cert. denied, No. 81-693 (Jan. 11, 1982). The critical fact here is that Browning regularly engaged in the traditional longshoring operation of unloading cargo from a vessel (Pet. App. A-3, A-5, B-2, B-4, B-9), thus falling squarely within the scope of the Act.[3]

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[3]The fact that the cargo Browning unloaded consisted of materials to be used in bridge building is irrelevant for coverage purposes. *Gilliam* v. *Wiley N. Jackson Co., supra*, 659 F. 2d at 58. The ultimate use of cargo is never relevant in determining whether one is engaged in longshoring. The important factor is that Browning was regularly engaged in the traditional longshoring job of unloading cargo from a vessel moored in navigable waters and was thus exposed to the traditional hazards of longshoring work that the LHWCA was designed to cover.

Petitioners also protest (Pet. 4 & n.2, 5 & n.3, 10) the court of appeals' conclusion that the situs requirement of Section 3(a) was met. Browning

2. Although the ruling below is correct, it conflicts with decisions of the Second Circuit that deny coverage to maritime construction workers working on actual navigable waters whose duties include the unloading of cargo from supply vessels.

In *Fusco* v. *Perini North River Associates, supra,* 622 F. 2d at 1112-1113, the Second Circuit denied coverage to two workers engaged in constructing a sewage treatment plant on actual navigable waters. The court specifically rejected (*id.* at 1113) the argument that a marine construction worker could be covered because his job included longshoring activities:

> When [the claimant] unloaded a barge used in carrying construction materials from the shore to the point of construction, he was not performing operations which longshoremen perform. Longshoremen do not unload barges used in connection with construction of a structure which reaches from a point on shore to a point in the river.

In *Churchill* v. *Perini North River Associates, supra,* the Second Circuit relied on its ruling in *Fusco* to deny coverage to another marine construction worker even though that worker was injured while he was on a barge in actual navigable waters. In addition to arguing that Churchill was covered because he would have been covered before the 1972 amendments extended coverage under the LHWCA, the Director argued that Churchill was covered because his

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was killed while on a "footing" consisting of a platform placed on the top of piles driven into the river bed but unconnected to shore, located about 500 feet from land, in approximately 20 feet of water. In these circumstances, the court correctly noted that "no real question is raised" as to whether Browning was injured on navigable waters, as defined under the amended Act (Pet. App. A-6). See generally *Trotti & Thompson* v. *Crawford,* 631 F. 2d 1214 (5th Cir. 1980).

duties at the time of injury included the unloading of caissons and other material from supply barges. The Second Circuit rejected these arguments, however, and denied coverage.

On February 22, 1982, this Court granted the Director's petition for a writ of certiorari in *Churchill* v. *Perini North River Associates, supra.* That case presents the question whether "a marine construction worker injured while working on actual navigable waters is 'engaged in maritime employment' within the meaning of Section 2(3) of the [LHWCA]" (81-897 Pet. Br. I). Because the resolution of that question will likely control or substantially influence the resolution of this case,[4] we believe that the Court should hold this petition in abeyance pending its decision in *Perini.*

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[4]If this Court holds in *Perini* that marine construction workers who are injured on actual navigable waters remain covered under the amended LHWCA, Browning would be entitled to benefits. The "footing" on which Browning was killed would have qualified as actual navigable water under the pre-1972 Act. See *Dixon* v. *Oosting,* 238 F. Supp. 25, 29 (E.D. Va. 1965). In any event, his job regularly required him to work on the water.

## CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, No. 81-897.

Respectfully submitted.

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